From: Ganesh and Sashikala Prasad
To: Microsoft ATR
Date: 1/22/02 10:46am
Subject: Microsoft Settlement

23 January 2002

Dear Sirs,

I wish to submit my comments (attached) to the database of public feedback on the proposed settlement between the Department of Justice and Microsoft, which must reach you before the 27th of January.

I am submitting them in both plaintext and HTML formats for your convenience.

Regards,

Ganesh Prasad

Comment on Microsoft antitrust settlement

Sydney

1 January 2002

Dear Sirs,

I am an Australian citizen with about 15 years in the computer industry. What happens in the US vs. Microsoft antitrust case affects me professionally as well as personally, since I am a fairly heavy user of computer software and technology. I would like to comment on the settlement jointly proposed by the Department of Justice and Microsoft. To be blunt, I believe the proposal is a dishonest one that sells out the public interest. I will explain why, and offer some guidelines for a fairer remedy.

1. Microsoft's main crime (not bundling, but the prevention of bundling) has had lasting anti-competitive effects that the settlement should address but doesn't

The argument that has most often been used against Microsoft is the "bundling" one, the allegation that Microsoft bundled its browser (and now its media player and instant messaging software) with its operating system. By doing so, it leveraged its monopoly in operating systems to enter other markets. Though this is a classic antitrust argument, people who believe in a free market are not convinced because the remedy does not sound right from the standpoint of the consumer interest. Consumers enjoy greater convenience, not less, when extra software is bundled with the operating system they buy. That is why the harsher remedy proposed by some of the states is also wrong. Forcing Microsoft to unbundle such software needlessly inconveniences the consumer. It also takes away from Microsoft's legitimate right to decide what goes into its products and puts the courts in the avoidable position of having to define the scope of technologies such as operating systems when they are not technically qualified to do so. The only parties
that are benefitted by such a remedy are competitors. Doesn't this add credibility to Microsoft's claim that its competitors are inefficient and require government intervention to survive?

However, the prosecution has failed from the start to argue this point with the right emphasis. What Microsoft did that seriously disadvantaged the consumer was not so much bundling its own browser with its operating system, but preventing computer resellers (OEMs) from offering consumers a choice by bundling competing browsers such as Netscape Navigator. Microsoft threatened OEMs such as Compaq with the withdrawal of their Windows 95 license if they dared to bundle Netscape Navigator with the PCs they sold. Given the overwhelming dominance of Windows 95 in the operating system market at that time, a withdrawal of that license could have bankrupted even an OEM as large as Compaq. The threat was credible and secured the compliance of all OEMs. So certainly, Microsoft did leverage its monopoly in operating systems to gain entry into the browser market, and it did so both through the relatively benign means of bundling its own browser, and by the decidedly illegal means of preventing consumers from sampling the wares of its competitors. Any free market advocate can readily see the consumer harm in this latter action of Microsoft's, but the prosecution has damaged its own case by not emphasising this enough.

Microsoft has also had secret agreements with OEMs that prevent them from offering consumers the choice of which operating system to boot when they start up their computers. This is often known as the "bootloader clause". Microsoft abused its monopoly in operating systems by threatening OEMs and blocking, at the source, the entry of other operating systems into the market. Consumers have had no opportunity to know about or sample competing operating systems. In other words, Microsoft abused its operating system monopoly to maintain that monopoly, which is another violation of antitrust law. The fact that no OEM except IBM dared to testify against Microsoft during the trial is itself proof of Microsoft's terror tactics. Their silence speaks louder than any testimony.

Microsoft's history is full of such anti-competition and anti-consumer actions. Bristol Technology won a case against Microsoft (over Microsoft's sudden withdrawal of support for their Unix interoperation software Wind/U) but was awarded a laughably poor compensation of one dollar. Caldera had a strong case against Microsoft (over the illegal way in which Microsoft used Windows 3.1 to force consumers to buy MS-DOS rather than Caldera's DR-DOS) but its silence was bought through an out-of-court settlement. The consumer has been the ultimate loser in all these cases because Microsoft's actions removed competitive choice and interoperation options.

The DoJ's proposed settlement shows an awareness of these abuses and aims to prevent their recurrence, but it needs to be far stronger and bolder. The damage to the industry has been done systematically, over more than a decade, and significant network externalities have been created that work to perpetuate the Microsoft monopoly. How can this damage be reversed by a mere forward-looking arrangement? Consumers and Microsoft's competitors now face nearly insurmountable market hurdles to creating a viable alternative computing environment, even though technically good alternatives are available. Even if Microsoft's abuses are halted, the structural and systemic forces they have created over the past decade will continue
to work in their favour. At a time when consumers look to the government to right these
historical wrongs, the settlement that the government proposes is inexplicably defeatist.
It resigns consumers to the status quo! One would imagine that a prosecution that has had its argument upheld by two courts would have the momentum, confidence and real power to broker a deal that restores genuine choice to the consumer, not step lightly around an entrenched monopoly that was the problem to start with.

2. A criminal should not be allowed to keep his ill-gotten gains

Microsoft's monopoly profits are the direct result of these and other illegally anti-competitive
tactics.

The antitrust case established that the absence of competition emboldened Microsoft into charging $89 for Windows instead of $49. In other words, consumers paid extra merely because of a monopoly that was being illegally maintained.

Four eminent economists filed an amicus curiae brief during the remedies phase of the trial in which they showed that Microsoft's rate of return on invested capital was 88%, while the average in other industries was about 13%!
[See www.econ.yale.edu/~nordhaus/homepage/Final%20microsoft%20brief.pdf]

Microsoft could never have made such huge profits without its illegal maintenance and extension of its monopoly, and therefore a major part of its current wealth is illegally earned.

There is absolutely nothing in the proposed settlement that addresses the issue of these ill-gotten gains, or how these will be reimbursed to the public from whose pockets they came. This simple omission easily amounts
to billions of dollars, and by itself makes the settlement a sellout of the public interest, even without an assessment of its other shortcomings.

3. Ill-gotten gains should not be allowed to influence the outcome of this case

It is disturbing to read that many states are settling because they are running out of funds to pursue the case further as they would like to. Meanwhile, Microsoft, with its multi-billion dollar war chest, has no such constraints. They can outlast all their opponents. The world is learning the cynical lesson that the American justice system is a mere extension of the free market
-- you get as much justice as you can afford to pay for.

What happened to the principle (so successfully applied in the Al Capone case) that criminals should not be able to use their ill-gotten gains to pay for their legal defence? Wouldn't a scrupulous application of that principle prevent the distortion we see here? If a convicted abusive monopolist has more funds than its prosecutors, and that fact is forcing them to settle,

can't the monopolist's funds be frozen, or can it not be made to pay the legal costs of its prosecutors? A simple ruling along those lines might see Microsoft scrambling to agree to a fairer settlement, one that will better safeguard the freedom of the consumer.

4. There is no attempt at punishment for wrongdoing

Though it has been established that Microsoft has repeatedly broken the law, the settlement only defines mechanisms to prevent future wrongdoing. What about punishment for past wrongdoing?

Are murderers let off scot free with mere provisions to prevent future murders? What kind of example does this set? And what confidence does this inspire in the American justice system?

Any remedy must include appropriate punishment.

5. The economy is being used as a bogeyman to prevent punishment

It is being argued that in the current difficult economic climate, Microsoft should not be broken up or otherwise punished, because that will in turn affect the rest of the economy (through a fall in the stockmarket index, a delay in the recovery of hardware sales, more unemployment and hardship, etc.). On the contrary, the lessons of Economics are that monopolies are always bad. They reduce efficiency, innovation and economic activity. In other words, Microsoft's monopoly has already affected the economy adversely. An end to the Microsoft monopoly may result in some churn, but that churn will be the ferment of genuine innovation from the rest of the industry. The impact on the stockmarket from a fall in Microsoft's share price will be more than offset by the rising stocks of independent software companies that can operate without fear of a monopolist's wrath. A decisive curbing of Microsoft's stifling influence will create more confidence in the rule of law, generate more jobs and help the economy.

Therefore, it is dishonest and self-serving on the part of the DoJ to suggest that this settlement proposal is the best one from the viewpoint of the economy. Moreover, the state of the economy should not determine whether or not a crime should be punished.

It takes a statesmanlike judge to see beyond the petty posturing and to do the right and wise thing.

Guidelines for a fair remedy:

Any remedy in a case that has been so clear-cut in its findings must be more assertive in its defence of consumer interests. Regardless of specifics, such a remedy must address the following:

1. Recurrence: Microsoft must not be able to continue to abuse its monopoly the way it has in the past.

2. Reimbursement: Microsoft has no right to retain the excess profits it has earned as a result of its illegal actions. This money should be repaid to the consumer.

3. Reparations: As Microsoft is responsible for the current uncompetitive market in operating systems and related applications, it must underwrite efforts to restore competition and consumer choice. The rest of the market should not have to pay to recover from Microsoft's abuses.

4. Reference: Microsoft must pay punitive damages over and above its reimbursement and reparations obligations, to serve as a warning to deter future monopolists. The remedy must in no case send out a signal that a large enough violator can get off lightly. Future tax dollars can be saved by discouraging abuses instead of having to prosecute them.

The DoJ is supposed to be acting on behalf of the consumer, and they must

pursue a remedy that addresses all the above issues.

For example, a remedy that required Microsoft, among other things, to only sell through channels that offer at least one other operating system, could address the reparations issue and break the structural forces perpetuating their monopoly (If an OEM requires training to support another operating system, Microsoft may be forced to subsidise such training).

The proposed settlement goes partway towards addressing the issue of recurrence, but does so only half-heartedly because it creates significant exceptions and loopholes
for Microsoft to take advantage of. It completely ignores the other three issues. An impression is created that the DoJ is more sensitive to Microsoft's interests
than to the interests of consumers who have been systematically robbed of both their choices and their money.

Therefore this proposed settlement must be rejected as not being in the public interest.

History will be the judge

After the immediate tumult over this case dies down, there will be a dispassionate analysis of all aspects of the Microsoft phenomenon in the computer industry, and the roles of all players will be dissected. It seems fairly certain that the Department
of Justice will be likened to a champion boxer who was paid to throw his fight. Judge Jackson will probably be faulted for his many indiscretions, but it may be remembered that his analysis was on the mark, and his verdict fearless. The appeals court will probably be remembered as being fair though it started with a reputation for being consistently lenient towards Microsoft.

What will Judge Kollar-Kotelly be remembered for? Will she be known as the one who meekly accepted an agreement that sold out the public interest, because it was politically
expedient to do so? Or will she be remembered as the person who braved the prevailing political winds to do the right thing and restore balance to a corrupted system?

The world is watching to see what she will do.

Regards,

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